



POLICE DEPARTMENT

October 20, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Roberto Assencao
Tax Registry No. 917254
Police Service Area 9
Disciplinary Case No. 83858/08

The above-named member of the Department appeared before me on May 5 and May 25, 2010, charged with the following:

1. Said Police Officer Roberto Assencao, assigned to PSA #9, on or about June 14, 2007, while off-duty, within the confines of Bronx County, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: said Officer intentionally threw a plunger which struck and caused bruising to an individual known to the Department. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

The Department was represented by Rudolph Behrmann, Esq. and Mark D. Berger, Esq., Department Advocate's Office, and Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

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SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Sergeants Richard Hurtle, Douglass Maresca, and Kara Fehsal as witnesses. The Department also offered the out-of-court statement of Norka Diaz which was received in evidence.

Sergeant Richard Hurtle

Hurtle has been employed with the Department for nearly 14 years. As a sergeant assigned to the Housing Bureau Investigations Unit, Hurtle investigates misconduct cases. Hurtle was assigned to an investigation involving Respondent concerning a domestic dispute with his wife, Norka Diaz. This dispute took place on June 14, 2007. Hurtle was assigned to this investigation on July 25, 2007. Hurtle obtained the initial callouts that were completed by the Bronx Investigations Unit, as well as associated Department paperwork.

Diaz threw a plunger at Respondent. Respondent then picked up the plunger and threw it back at Diaz, striking her in the stomach. Diaz stated to someone at Bronx Investigations that this caused her a bruise. Hurtle spoke with Diaz on August 10, 2007 over the telephone. Prior to this, someone from Bronx Investigations interviewed her on June 14, 2007 the same day as the incident. The interview was taped, which Hurtle listened to. Hurtle's interview with Diaz was also recorded and he listened to that also.¹ Respondent stated his wife threw a plunger at him, and then he picked up the plunger and tossed it back at her.

¹Department's Exhibit (DX) 1b was received in evidence. It is the transcript of Hurtle's interview of Diaz, dated August 10, 2007.

On cross-examination, Hurtle stated he reviewed the paperwork and conducted a follow-up interview with Diaz. Hurtle agreed that the bulk of the work in this case was done by Bronx Investigations, as well as the duty captain, Captain Peter Moreno. Moreno responded when this incident occurred, and met with Diaz on the date of the incident. Sergeant Maresca from Bronx Investigations was there also. Hurtle did not speak to them regarding their interview with Diaz, and only read the statement of the Diaz interview that was reduced to paperwork.

Moreno generated a 49² based on what he believed occurred. Upon being asked if Moreno's initial conclusion was that nothing significant had occurred, Hurtle stated, "He did...what happened is that they do a preliminary investigation..." Hurtle explained that Moreno left the case open so that the appropriate investigation could be conducted. Hurtle was asked if he remembered Moreno's conclusion that there should be no change of duty status for Respondent. Hurtle stated Moreno left the duty status as is – Respondent was already restricted.

Hurtle acknowledged that in the duty captain's final report for June 14, 2007, he said the allegations made by Diaz could not be substantiated at the time. Hurtle agreed that most of the work on this case was done by Moreno. Hurtle had a brief conversation with Diaz. He received other paperwork such as Domestic Incident Reports (DIRs), and looked into whether there were any radio runs. However, Hurtle agreed that he did not learn anything new in his investigation that Moreno did not already know.

Moreno interviewed Diaz in person, while Hurtle interviewed her by phone. Moreno also interviewed people in the 44 Precinct, where Diaz had gone that morning. Hurtle never interviewed anyone from the 44 Precinct. He also acknowledged that he did

² "49" is a Department Memorandum.

not conduct any in-person interviews and he did not interview Respondent. However, Hurtle substantiated a charge that Moreno recommended be unsubstantiated. Upon being asked what led him to do this, Hurtle stated he substantiated that Respondent had a dispute with his wife and a plunger was thrown. Even though Respondent did that, Diaz stated she thought it was an accident, and not intentionally done. Hurtle did not make the matter a criminal issue, and agreed that it did not come to him as a criminal case.

Later in the morning, Diaz went to the precinct because she wanted Respondent to get domestic counseling. Diaz said she believes a married man should come right home after work. When asked if that was one of her main complaints, Hurtle said, "I don't know if that was the main complaint. I think she was looking to get counseling."

Diaz did not get any medical attention after the incident. Hurtle testified that Diaz said she had a bruise, but also stated that she bruises easily. Diaz went to the precinct that morning, and then went to work as usual. Diaz informed Hurtle that she never had any physical altercations with Respondent before this incident.

Hurtle spoke with Moreno in preparing this case. Hurtle documented his conversation with Moreno in a worksheet, which was shown to him so he could refresh his recollection about the conferral. Hurtle agreed that Moreno's assessment of what happened was that it was unintentional. Moreno thought it was "just the two of them acting stupidly."

Upon questioning by the Court, Hurtle stated there were photographs taken of Diaz's bruise, which were in the callout package Hurtle received from Bronx Investigations.

On recross-examination, Hurtle acknowledged that Moreno said in his report that

no visible injuries could be seen in the photographs. Hurtle said there were photographs taken of a bruise. He acknowledged, however, that he did not speak to anyone who saw a bruise, including Moreno. He stated Diaz mentioned a bruise when Bronx Investigations interviewed her. Hurtle stated when he interviewed Diaz, she did not mention a bruise.

On redirect examination, upon being asked his understanding of what Diaz sustained, Hurtle said Diaz sustained a bruise to her stomach area on the left-hand side as a result of a plunger being thrown at her. When asked if he understood the bruise to be a physical injury, Hurtle stated he understood it to be a bruise.

Sergeant Douglass Maresca

Maresca has been employed with the Department for approximately 19 years. For the past four years, he has been assigned to the Bronx Investigations Unit. He interviewed Diaz on June 14, 2007 in a radio car in front of her place of employment.³

Diaz stated to Maresca that on the night before the incident, the toilet in the apartment had backed up. She called Respondent while he was at work to tell him to come and fix the toilet. Respondent arrived home at approximately 5:00 a.m. As he walked through the door, Diaz picked up the toilet plunger, threw it at Respondent and engaged in a verbal argument. Respondent then picked up the plunger and tossed it back in Diaz's direction, striking her in the stomach area. Diaz received a bruise as a result of this, but stated she bruises easily. Diaz received the bruise "on her stomach somewhere." Maresca did not view the bruise.

Diaz did not want to see Respondent get in trouble with his job. Her only wish

³ DX 1a was received in evidence. It is the transcript of Maresca's interview of Diaz, dated June 14, 2007.

was that he gets marriage counseling. Diaz never recanted her story about what took place. Diaz never told Maresca that any of her statements regarding the incident were untrue. When asked for his conclusion, Maresca stated, "My assessment was neither party had intention of hitting each other with the plunger." He further stated that they had an argument.

On cross-examination, Maresca stated this case was actually investigated by Moreno. Maresca interviewed Diaz the day of the incident. He did not see any injuries at the time. Maresca also interviewed Respondent that day. When interviewed, Respondent stated he did not hit Diaz with the plunger. When this investigation was closed by Maresca and Moreno, it was concluded that a verbal dispute had occurred but there was no evidence of physical abuse from either party. It was also noted in the closing that Diaz admitted she initiated the incident. Her primary reason for going to the police was that she thought it was a good place to get marriage counseling. Maresca acknowledged that Diaz stated, "A married man shouldn't be coming home at five o'clock in the morning." There was no history of physical abuse. Diaz felt the plunger striking her was inadvertent.

Maresca was asked if Respondent said, "Although I threw it back at her, there was no way it hit her." Maresca did not recall Respondent saying that. Maresca stated, "[Respondent] did say to me that it did hit her." Diaz did not receive medical attention. Maresca was asked if, at some point during her verbal dispute with Respondent, Diaz broke a telephone in the apartment. Maresca did not recall Diaz stating that she broke a telephone in the apartment.

On redirect examination, Maresca agreed that although Respondent was explicitly

asked whether he hit Diaz with the plunger, he did not deny it.

On recross-examination, Maresca stated he would have to look back at the transcript to refresh his recollection as to whether Respondent was explicitly asked whether he hit Diaz with the plunger. The transcript included the following:

Q: Did it strike her, do you know? Do you recall? Did you just kind of toss it?

A: I tossed it at – as I walked in, she tossed it towards me. I picked it up. I just tossed it in her direction.”

Maresca agreed there was no follow-up after that. He did not clarify whether it actually hit her.

Sergeant Kara Fehsal

Fehsal has been employed with the Department for 14 years and has been with the 44 Precinct for seven years. Fehsal is currently her command's Domestic Violence sergeant. Fehsal met with Diaz, but does not remember the incident. Fehsal does not specifically remember their conversation, but did prepare the DIR (DX 2).

According to the DIR, Diaz claimed she had a bruise stemming from the allegations in the report. Fehsal states that she was able to view Diaz's bruise. There were photographs taken, but Fehsal does not remember who took the photographs.⁴

Upon being asked if the photographs were a fair and accurate representation of Diaz as she appeared on June 14, 2007 Fehsal stated she does not know. She cannot remember exactly if that was the person and cannot accurately say yes. Fehsal remembers the incident, but does not remember specifics.

⁴DX 3a is a photograph of a Hispanic female showing a pinkish discoloration to her abdomen. DX 3b is a close-up photograph of the aforementioned abdomen. Both photographs are date-stamped "06/14/2007."

Upon questioning by the Court, Fehsal testified that her DIR dated June 14, 2007 made reference to photographs being taken. She also testified the photographs were dated June 14, 2007.

Statement of Norka Diaz⁵

Diaz was interviewed by Maresca on June 14, 2007. Present at the interview was Moreno. Diaz and Respondent have been married for six years. They have a four-and-a-half year old son.

On the morning of June 14, 2007, Diaz went into the 44 Precinct to make a complaint against Respondent. At the precinct, she told the receptionist that she had a domestic incident in her house. Diaz made a complaint because Respondent came home at 5:00 a.m. She was upset because the toilet overflowed. Diaz called him at work because she needed help with the toilet. She called him at 11:30 [the previous night] to say there was a problem with the toilet. He did not come home until 5:00 a.m., at which point Diaz threw a plunger at him. Diaz then stated that Respondent hit her on the stomach with the plunger. She said, "I guess he wanted to throw it at me, but it hit me on my stomach." Maresca then asked her if it caused her any injury, to which she said no. He went on to ask about bruising:

Q: Do you have any bruises?

A: I do, but I get bruised easily.

Q: Where do you have bruises? [Interposing] On your stomach where it hit you?

A: Mm hmm.

⁵ Diaz was also interviewed by Hurtle via telephone on August 10, 2007. Diaz essentially gave the same statement as her in-person interview with Maresca.

After this, because the toilet was not working, Diaz took her things and she went to her mother's house to take a shower. She went back to the house to make sure that her son's lunch was packed. At the time Diaz went to her mother's house, her mother was not there. Nobody was there.

Diaz went back to her house at 7:00 a.m. When she went back, Respondent was with their son. Diaz stated, "I told him to get out, and he said no." Respondent started getting their son ready for school, and told Diaz, "You – we have to stop this because [of] the baby." So she left and went to the precinct. Upon being asked why she went to the precinct, Diaz stated, "Well, I think that we need a marriage counselor."

Diaz did not attempt to call 911, but she was going to call the babysitter so she could bring her son there. Respondent disconnected the phone because he did not want her to call anyone. Respondent told her not to call his job, saying that he will get fired. However, Diaz was not attempting to call his job. Respondent did not know who she was going to call, but assumed she was calling the police. Diaz tried to leave with her son and he told her she could not leave. He held the child and would not let her take the child. That was when Diaz wanted to call the babysitter. She tried to pick up the phone and when she did, it did not sound like it was working. Respondent admitted to disconnecting the phone.

Diaz stated that there have been problems in her relationship with Respondent from day one. The problems in their relationship are his family, because they do not like Diaz, and his ex-girlfriend, who harassed Diaz in the beginning of the relationship. There has never been any police response or DIRs filed in regard to the two of them prior to this incident. Diaz stated Respondent has never physically struck or harmed her in any way.

Respondent got off work at 11:30 p.m. and came home at 5:30 a.m. He did not say where he was. Diaz believed a husband should come straight home and not come home at 5:00 o'clock in the morning. She stated that in the past, she felt like calling the police because of the arguments they had. She thought about calling the police before, but the arguments did not escalate to anything violent. Diaz stated the escalation is verbal and called it verbal abuse. However, this incident was different because a plunger was thrown. Diaz admitted that she was the one that started the argument. She also stated everyone in a relationship has arguments. When asked what she would like to see happen, Diaz stated that she wanted Respondent to go for counseling. She did not want him to lose his job.

Respondent's Case

Respondent testified in his own behalf.

Respondent

Respondent has been working for the Department for 13-and-a-half years. He is currently assigned to Police Service Area 9, where some of his duties and responsibilities included desk officer, patrol and the intelligence office. On June 14, 2007, Respondent was living in the Bronx with Diaz and his son. Respondent was working the 4:00 p.m. to 12:00 a.m. shift right before the incident. At that time, Respondent was a desk officer because he was on restricted duty for medical reasons. He had a seizure, so he was put on medical restriction for one year. Respondent and Diaz had been married for approximately six years.

The day of the incident, Diaz called Respondent on the desk phone because she was annoyed that the toilet was backed up. When asked to describe his relationship with Diaz, Respondent stated there were issues because he has a son from a previous relationship. "It's always been a problem with her if I ever spend any time with him... the week prior to the date in question, I had attended my son's graduation and that was something she wasn't happy about."

Respondent spoke to Diaz five or six times from the command. She was "very high strung" and "angry." Respondent told her he could not talk because he was busy doing his duties at the desk. She kept calling back. Respondent did not ask for lost time to go home. When his shift ended, he stayed at the precinct until 12:15 a.m. and then went to a local café. He did not speak to Diaz during that time. He was hoping she would be asleep by the time he got home, as he wanted to avoid confrontation. He returned home at 5:00 a.m.

When Respondent opened the front door, Diaz was standing in the living room. Respondent closed the door and Diaz threw a plunger at him. "The toilet is overflowing. Where have you been?" she screamed. Respondent did not remember exactly what else she said. The plunger was a "regular size plunger." It did not hit Respondent when Diaz threw it. It hit a cardboard box to his right and then landed on the floor. Respondent picked up the plunger and tossed it back at her. It did not hit her. It landed three to five feet to her left. The plunger did not fly overhead, Respondent said he, "just tossed it back."

Respondent walked past Diaz into the bathroom to check the toilet. He started mopping the floor in the bathroom. While he was doing this, Diaz was screaming and

yelling. She was angry that he got home late. As time went by, she walked from one room to the next. He finished mopping the bathroom and went into the bedroom. By this time, their son woke up from the noise. Respondent turned the TV on for him and started getting him ready for school. During this time, Diaz was not in the same room. She was getting ready for work. She walked into the living room, which is out of Respondent's sight. He could not see her at that point.

By the time Respondent put their son on the bus for school at 8:00 a.m., Diaz had left. Respondent did not know where she went. A short time later, a sergeant from the 44 Precinct came to the apartment. The sergeant explained that his wife made a report against him and he had to go to the precinct. When asked what eventually happened with respect to when he arrived at the precinct, Respondent stated he contacted his union delegate, was met by a sergeant from Bronx Investigations and had to submit to an interview.

Respondent's duty status did not change. He was on medical restriction, but his duty status did not change to modified. He never had to go to court for this incident. He was not given any domestic violence counseling as a result of this. Diaz did not take out an order of protection against him. Currently, Respondent is on full duty. There have not been any other incidents with Diaz. They are trying to work it out and Respondent is home three or four days a week. The rest of the time, he is with his mother.

Respondent was asked to view the photographs in evidence (DX 3a and 3b). Upon being asked if those were the same clothes Diaz was wearing on the date of the incident, Respondent did not recall. Respondent was asked to focus on Diaz's abdomen. He stated there was nothing out of the ordinary and he did not see any injuries. Diaz

never requested any medical attention, she never complained that she was hit with the plunger that day, and she did not say she was in pain. When questioned about the redness on her abdomen, Respondent replied, "That is not an injury. That's...it's my wife."

On cross-examination, Respondent stated he did not ask his wife why she was not going to testify. He and his wife did not discuss this incident. Respondent got off duty at 11:23 p.m. on June 13, 2007. He arrived at his apartment between 4:30 a.m. to 5:30 a.m. He did not go home right away because he was trying to avoid conflict. It did not occur to him that staying out late when his wife asked him to come home might exacerbate a fight. Upon being asked if there was an ongoing argument concerning attending his son's graduation, Respondent said that when Diaz called him, "the issue with my son was not brought up at that time." Whenever the issue of his first son came up, Respondent stated Diaz did not always immediately express her feelings. Sometimes things would come out two or three days later.

Upon being asked if he was perturbed when his wife threw the plunger at him, Respondent said, "Perturbed? No...It happened so fast, I couldn't tell you. The plunger did not even hit me. It hit the side on the box and it fell down. It didn't even come that close to me." Respondent tossed the plunger right back at her. It was wet. He did not want the plunger to wet the floor where he was standing. There is a carpet in the middle of the living room. Respondent preferred the \$20 carpet to get wet rather than the floor he worked hard on.

Respondent never actually denied hitting his wife with the plunger during the interview. He refreshed his memory by reading the minutes of the interview and stated that they never asked him that question. Upon being asked if he ever made it clear that

he did not hit Diaz with the plunger, Respondent stated he did make it clear. Respondent read the following portion of the transcript of his official Department interview aloud:

Q: When you picked it up and you tossed it back at her,
were your intentions to physically harm or endanger her
in any way?

A: No.

Respondent was asked to clarify if he was saying no, that he did not hit her with the plunger, or no, he did not intend to harm her. Respondent stated that he meant that he did not hit her with the plunger, even though that is not what he said. Respondent explained that that is what his answer meant to him at the time. Upon being asked if he is adamant that the plunger did not hit his wife, Respondent stated, "I was adamant about it the date of the incident, too."

FINDINGS AND ANALYSIS

Respondent stands charged with engaging in conduct prejudicial to the good order, efficiency and discipline of the Department in that on June 14, 2007 he intentionally threw a plunger which struck and caused bruising to an individual known to this Department (later identified as Norka Diaz). Respondent is found Not Guilty.

Evidence adduced at trial established that Respondent had worked the 4 p.m. to 12 a.m. shift the night before the incident date. He testified that Diaz, his wife, had called him at work several times as he worked at the desk to report that the toilet at home was clogged. He asked her to stop calling and he would see her after his tour ended, but she continued to call him throughout the night. Respondent stated that when he got off from work at approximately 11:23 p.m., he did not go straight home. He wanted to avoid a

conflict with Diaz, who was angry, so he waited until he thought she would be asleep to head home. He arrived at 5:00 a.m., but Diaz was waiting for him in the living room. As Respondent closed the front door, Diaz threw a wet toilet plunger at him. Respondent testified that it hit a box and then fell to the floor. He then picked up the plunger and tossed the plunger back in the direction of Diaz.

It was alleged that the plunger that Respondent tossed hit Diaz and caused a bruise. Diaz, however, failed to appear at this proceeding and a hearsay case was presented by the Assistant Department Advocate. Two previous statements of Diaz were received in evidence. An interview conducted by Bronx Investigations on the incident date June 14, 2007 (DX 1a), and a telephone interview of Diaz by Sergeant Hurtle on August 10, 2007 (DX 1b), two months after the incident.

With respect to the June 14, 2007 interview, Diaz stated that she went to the 44 Precinct on that date about 7:45 a.m. because she had a domestic incident with her husband who is a police officer. When asked what happened she stated, "He came in at 5:00 o'clock in the morning." Diaz explained that she called her husband (Respondent) at work to inform him that she was having problems with the toilet. It overflowed twice and Respondent said he was coming home. Diaz said he got off from work about 11:30 p.m., but did not come home until 5:00 a.m. When he came home at 5:00 a.m., she threw a plunger at him. Diaz said that Respondent "hit me with the plunger on my stomach."

Sergeant Maresca of Bronx Investigations inquired how she was hit. He asked if she was punched with the plunger and Diaz said no. He asked, "Okay. Did it leave his hand and hit you or?" and Diaz responded, "No. Just like he, you know." She then explained that Respondent probably wanted to throw it at her but it hit her in the stomach.

Maresca asked if it caused any injury and Diaz replied, "No."

The next series of questions from Maresca implied that Diaz had a bruise without her offering that information. The next series of questions followed:

Sgt. Officer: It wasn't in his hand? Okay. So he threw it,
it hit you in the stomach. Did it cause you
any injury?

Diaz: No.

Sgt. Officer: Okay. Do you have any bruises?

Diaz: I do, but I get bruised easily.

Sgt. Officer: Where do you have bruises?

Diaz: In right now...

Sgt. Officer: [Interposing] On, on your stomach where it hit you?

Diaz: Mm hmm.

It is clear from the series of questions that Diaz never said she sustained a bruise from the plunger. In fact, the reference to the bruise came from Maresca. Diaz was not given the opportunity to explain where the bruises on her body were, if any, and what caused them. She had stated in her interview that she bruises easily.

What is also interesting to note is what Diaz did next. She told Maresca that she argued with Respondent and told him to leave, but he did not. When Maresca asked what she did next, Diaz said the following: "I took my stuff, because how the toilet wasn't working, I took my stuff, and I went over to my mother's house, and I took a shower. Then I came back, and I made sure that my son's lunch was packed." Diaz did not seem to be concerned with any interaction she had with Respondent. She explained that Respondent came home at 5:00 a.m. She left about 6:15-6:30 a.m. She returned at 7:00

a.m. and prepared lunch for her son. She stated that she then left and went to the precinct because they need a marriage counselor. When asked, Diaz stated that at no time did she attempt to call 911 from her home or any place else. She also never complained of being injured, nor did she seek medical attention. In fact, Diaz, after leaving the station house, reported to work where she was interviewed by Bronx Investigations later that day.

Diaz was further questioned by Duty Captain Moreno. He asked her if she ever felt like going to the police station for an incident like this in the past. Diaz responded, "Yes. When I got pissed off that, you know, like, he'll say I didn't get my way. But to my thing is, if we're together for six years, I believe that a husband should come straight home, and not come home at 5:00 o'clock, 4:00 o'clock in the morning." Diaz seemed to be more concerned with her husband staying out and getting marital counseling than concern for the alleged events surrounding the plunger. She seemed to be saying to Maresca that when Respondent stayed out late, those were the times that she thought about reporting him to the police. Diaz, however, told Moreno that this was the first time she actually went to the police and she also admitted that she "started things with the plunger." When Diaz was asked what she wanted to happen, she said, "I want him to go for counseling. And I would like for us to go for counseling. I've been asking this from him. I don't want him to lose his job. I don't." It is evident from Diaz's statement that her reason for going to the station house was to report that her husband comes in at 5:00 a.m. and she was seeking marriage counseling for him and herself.

The telephone interview of Diaz by Hurtle elicited essentially the same information that the interview by Bronx Investigations elicited. Diaz stated that she wanted the Police Department to help her and Respondent get marital counseling.

Respondent testified that he tossed the plunger in the direction of Diaz, but it never struck her. During his official Department interview, Respondent was asked whether he threw the plunger at Diaz and it struck her. The problem is the question was asked in the form of compound questions:

Sgt. Maresca: With the plunger...when you tossed it...was your intention to hit her with it?,,,

Respondent: No.

Sgt. Maresca: Did it strike her, do you know? Do you recall? You just kind of tossed it?

Respondent: I, tossed it as, as it, as I walked in she tossed it towards me. picked it up, I just tossed it in her direction. I was walking past her.

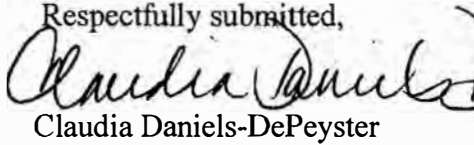
The latter questions were phrased in the form of compound questions and Respondent answered one question. There were no follow-up questions so that Respondent could answer the other questions posed.

Without Diaz coming in to testify, the Court was left with a hearsay case to determine what transpired between Respondent and Diaz. Photographs taken of Diaz were received in evidence. Although no one came in to testify that they had taken the photographs, the photographs were dated June 14, 2007, the incident date. In addition, the DIR prepared on June 14, 2007 (DX 2) referred to photographs of Diaz being taken. A review of the two photographs depicts what appear to be two red pimples on Diaz's stomach. Some redness in the stomach area that seems to be caused by the slacks she was wearing and a red line was also observed in the stomach area. None of these marks appear to be a bruise. In addition, no one testified before this Court that upon examination of Diaz's stomach, he or she observed a bruise on her stomach on the

incident date. Although Sergeant Fehsal, who prepared the DIR in this matter, was called in as a witness, she had no independent recollection of the incident. She could not recall if it was Diaz in the photographs in evidence or what had transpired, so there was no corroboration of the allegation of a bruise being observed by anyone. In fact, the DIR had a handwritten statement prepared by Diaz and at no point did she mention that she received a bruise after being struck by a plunger. Consequently, the hearsay allegation of Diaz that she was struck by a plunger, without any other corroboration, physical or otherwise is insufficient to establish the Charge and Specification pending against Respondent by a preponderance of the credible evidence. Similarly, Diaz never stated in her DIR or any other interview that she sustained a bruise.

Assuming *arguendo*, that any of the marks on Diaz's abdomen were considered to be a bruise, the issue would then be whether the act of Respondent in throwing the plunger amounted to misconduct. The answer is still no. Diaz stated that she did not believe Respondent intended to hit her with the plunger. Evidence established that the plunger was wet so the Respondent had to toss the stick end and he stated in his interview that he did not intend to hit Diaz. Thus any contact between the plunger and Diaz was inadvertent. It was not alleged that Respondent held on to the plunger and struck Diaz with it. Thus Respondent lacked the requisite intent to cause physical injury to Diaz and his inadvertent act did not amount to misconduct. Accordingly, I find Respondent Not Guilty.

APPROVED
APR 11 2011
RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,

Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials